Surendran Thuraisingam v Mahkamah Perusahaan Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–296–10 OF 2018
NORDIN HASSAN J
25 FEBRUARY 2019

Civil Procedure — Judicial review — Application for — Industrial Court granted dismissal of employment of applicant — Applicant applied for judicial review against Industrial Court's decision — Whether decision of the Industrial Court to strike off applicant representation only on jurisdictional issue without hearing merits of case was an error of law and irrational — Whether applicant's application premature — Whether applicant dismissed with just cause and excuse

Labour law — Employment — Dismissal — Applicant was dismissed from employment — Whether date of dismissal effective as in the date of notice

The present application was for judicial review against the decision of the Industrial Court, the first respondent, dated 13 July 2018 where the applicant's claim of unfair dismissal by the second respondent' was stroked off. The basis of the first respondent's decision was that it had no jurisdiction to hear the claim as there was no dismissal on 31 May 2013 as claimed by the applicant. On 3 December 2012 the applicant was employed by the second respondent as a project manager and subject to a probationary period of six months. However, on 4 April 2013, the applicant received an email from one Erwaniz Zulkefli, on behalf of the second respondent, informing that the applicant's employment was terminated with effect from end of May 2013. Dissatisfied with his termination of employment, the applicant lodged a complaint under s 20(1) of the Industrial Relation Act 1967 ('the Act') and thereafter the applicant's claim was brought to the Industrial Court by the Minister reference under s 20(3) of the Act. In the reference to the Industrial Court by the Minister it stated that the matter to be adjudicated was as to whether the applicant's dismissal by the second respondent on 31 May 2013 was without just cause and excuse. On 13 July 2018, the Industrial Court decided that the applicant was dismissed on the 1 June 2013 and not on the 31 May 2013 and as such there was no dismissal on 31 May 2013 as complained by the applicant. Consequently, the applicant's claim was struck off for want of jurisdiction since the applicant's representation was said to be premature.

Held, allowing the application with costs of RM4,000:

(1) There was no definition on date of dismissal in our legislation to rely on but it was a logical and reasonable conclusion that when no specific date given on effective date of dismissal, the date of dismissal by a notice had to be the date on which the notice expired. In the circumstances, the date of the applicant's dismissal by the second respondent was on the 31 May 2013 as also mentioned in the minister's reference to the Industrial Court. The conclusion by the Industrial Court that the dismissal date of the applicant was on the 1 June 2013 and not 31 May 2013 was an error of law and fact (see paras 9, 15 & 20).

(2) As that the applicant's date of dismissal was on the 31 May 2013, the issue of want of jurisdiction which was the basis for the Industrial Court to strike off the applicant's representation was no longer tenable. The applicant's representation was clearly not premature. The Minister's decision pursuant to s 20(3) of the Act to refer the applicant's representation to the Industrial Court was not challenged by the second respondent. As such, the Industrial Court must adjudicate the merits of the application including the jurisdictional issue. As such, the decision of the Industrial Court to struck off the applicant representation only on jurisdictional issue without hearing the merits of the case was an error of law, and irrational (see paras 21–23).

(3) The Industrial Court failed to exercise its function under s 20 of the Act when decided to strike off the applicant's representation without determining the real issue as to whether the applicant's dismissal was with just cause and excuse. The decision of the Industrial Court dated 13 July 2018 was tainted with error of law, irrationality and unreasonableness (see para 24).

[Bahasa Malaysia summary

Permohonan ini adalah untuk semakan kehakiman terhadap keputusan Mahkamah Perusahaan, responden pertama, bertarikh 13 Julai 2018 di mana tuntutan pemohon terhadap pemecatan tidak adil oleh responden kedua dibatalkan. Dasar keputusan responden pertama adalah bahawa ia tidak mempunyai bidang kuasa untuk mendengar tuntutan tersebut kerana tiada pemecatan pada 31 Mei 2013 seperti yang dituntut oleh pemohon. Pada 3 Disember 2012 pemohon telah diambil bekerja oleh responden kedua sebagai pengurus projek dan tertakluk kepada tempoh percubaan selama enam bulan. Walau bagaimanapun, pada 4 April 2013, pemohon menerima emel daripada seorang Erwaniz Zulkefli, bagi pihak responden kedua, memaklumkan bahawa pekerjaan pemohon telah ditamatkan berkuatkuasa dari akhir Mei 2013. Tidak berpuas hati dengan penamatan pekerjaannya, pemohon membuat aduan di bawah s 20(1) Akta Perhubungan Perusahaan 1967 ('Akta') dan selepas itu tuntutan pemohon dibawa ke Mahkamah Perusahaan oleh rujukan Menteri di bawah s 20(3) Akta. Dalam merujuk kepada Mahkamah Perusahaan oleh Menteri, ia menyatakan bahawa perkara

yang akan diadjudikasi adalah sama ada pemecatan pemohon oleh responden kedua pada 31 Mei 2013 adalah tanpa sebab dan alasan adil. Pada 13 Julai 2018, Mahkamah Perusahaan memutuskan bahawa pemohon telah dipecat pada 1 Jun 2013 dan bukan pada 31 Mei 2013 dan oleh itu tiada pemecatan pada 31 Mei 2013 yang diadukan oleh pemohon. Akibatnya, tuntutan pemohon telah dibatalkan kerana tiada bidang kuasa kerana perwakilan pemohon dikatakan pramatang.

Diputuskan, membenarkan permohonan dengan kos RM4,000:

(1) Tiada definisi pada tarikh pemecatan dalam undang-undang untuk bergantung kepada tetapi ia adalah kesimpulan logik dan munasabah bahawa apabila tiada tarikh tertentu yang diberikan pada tarikh pemecatan berkuatkuasa, tarikh pemecatan oleh notis tersebut hendaklah menjadi tarikh yang mana notis tersebut tamat tempoh. Dalam keadaan itu, tarikh pemecatan pemohon oleh responden kedua adalah pada 31 Mei 2013 sebagaimana yang disebutkan dalam rujukan menteri ke Mahkamah Perusahaan. Kesimpulan oleh Mahkamah Perusahaan bahawa tarikh pemecatan pemohon pada 1 Jun 2013 dan bukan 31 Mei 2013 adalah kesalahan undang-undang dan fakta (lihat perenggan 9, 15 & 20).

(2) Oleh kerana tarikh pemecatan pemohon pada 31 Mei 2013, isu ketiadaan bidang kuasa yang menjadi asas bagi Mahkamah Perusahaan untuk membatalkan perwakilan pemohon tidak lagi wajar. Perwakilan pemohon jelas tidak pramatang. Keputusan Menteri menurut s 20(3) Akta untuk merujuk perwakilan pemohon kepada Mahkamah Perusahaan tidak dicabar oleh responden kedua. Sehubungan itu, Mahkamah Perusahaan mesti menilai merit permohonan tersebut termasuk isu bidang kuasa. Oleh itu, keputusan Mahkamah Perusahaan untuk membatalkan perwakilan pemohon hanya pada isu bidang kuasa tanpa mendengar merit kes tersebut adalah kesilapan undang-undang, dan tidak rasional (lihat perenggan 21–23).

(3) Mahkamah Perusahaan gagal menjalankan fungsinya di bawah s 20 Akta apabila memutuskan untuk membatalkan perwakilan pemohon tanpa menentukan isu sebenar berkenaan sama ada pemecatan pemohon adalah dengan sebab dan alasan adil. Keputusan Mahkamah Perusahaan bertarikh 13 Julai 2018 tercemar dengan kesilapan undang-undang, ketidaksamaan dan tidak wajar (lihat perenggan 24).]

Notes

For cases on application for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5937–5949.

For cases on dismissal, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1178–1258.

Cases referred to

Abdul Rashid Jamaludin v Ultimate Manufacturing Solution (M) Sdn Bhd [2015] 4 ILR 99 (refd)
Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal [2018] 2 MLJ 537, FC (refd)
Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 MLJ 685; [1977] 3 CLJ 777, SC (refd)
Malaysian Airline System Berhad v Abdul Kader Mohamed Zulman, Kajang [1984] 2 ILR 562 (refd)
Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537; [1995] 4 CLJ 449, FC (folld)
R Rama Chandran v The Industrial Court Of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Rheem (M) Bhd v Metal Industry Employees' Union [1990] 1 ILR 550 (refd)
Southern Bank v Ng Keng Lian & Anor [2001] 4 MLRH 569 (distd)
Supermix Concrete (M) Bhd v Teoh Boon Beng [1978] 1 ILR 274 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 20, 20(1), (3), 30(5)
Rules of Court 2012 O 53 r 3(2)

S Muhendaran (Chong Wan Loo with him) (Muhendaran Sri) for the applicant.
Mahadi bin Muhammad (Mahadi Redzuan & Co) for the respondent.

Nordin Hassan J:

INTRODUCTION

[1] This is an application by the applicant for judicial review against the decision of the Industrial Court, the first respondent, dated 13 July 2018 where the applicant's claim of unfair dismissal by the second respondent' has been struck off.

[2] The basis of the first respondent's decision is that it has no jurisdiction to hear the claim as there was no dismissal on 31 May 2013 as claimed by the applicant.

THE SALIENT FACTS

[3] The relevant facts in this case can be summarised as follows:

(a) on 3 December 2012 the applicant was employed by the second respondent as a project manager and subject to a probationary period of six months;

(b) however, on 4 April 2013, the applicant received an email from one

Erwaniz Zulkefli, on behalf of the second respondent, informing that the applicant's employment has been terminated with effect from end of May 2013. For ease of reference, the said email is reproduced here as follows:

> From: EtWaniz eCEOs [,alito:erwaniz.zulkefli@eceos.net]
>
> Sent: Thursday, April 04, 2013 3:06PM
>
> To: *surendran.thuraisingam@eceos.com*
>
> Cc: 'Eceos Nazeli'; 'rosli kassim'; 'Nor Mohd Fazrin Harun'; jailani.mustafa'; 'zainal adnan'.
>
> Subject: Ending of Employment Contract
>
> Dear Surendran,
>
> Looking at the performance and feedback from your reporting manager the management has decided not to continue your employment. As such please take note of this email as a notice of termination of the employment contract. *Therefore your last working day will be end month May 2013*. We thank you for your contribution towards and the company and wish you all the best in your future career.
>
> Thank you.
>
> On behalf of the management,
>
> Erwaniz Zulkefli.

(c) dissatisfied with his termination of employment, the applicant lodged a complaint under sub-s 20(1) of the Industrial Relations Act 1967 ('the IRA 1967') and thereafter the applicant's claim was brought to the Industrial Court by the Minister reference under sub-s 20(3) of the same Act;

(d) in the reference to the Industrial Court by the Minister it states that the matter to be adjudicated is as to whether the applicant's dismissal by the second respondent on 31 May 2013 is without just cause and excuse; and

(e) on 13 July 2018, the Industrial Court decided that the applicant was dismissed on the 1 June 2013 and not on the 31 May 2013 and as such there was no dismissal on 31 May 2013 as complained by the applicant. Consequently, the applicant's claim has been struck off for want of jurisdiction since the applicant's representation was said to be premature.

THE GROUNDS OF THE JUDICIAL REVIEW APPLICATION

[4] The applicant's grounds for this judicial review application as presented in the statement pursuant to O 53 r 3(2) of the Rules of Court 2012 are the following:

(a) the Chairlady of the Industrial Court erred in her conclusion that the effective date of the applicant's dismissal was on the 1 June 2013 and not on 31 May 2013;

(b) the Chairlady of the Industrial Court had erred in her conclusion that the Industrial Court has no jurisdiction to hear the applicant's representation on the ground that the representation was premature;

(c) the Chairlady of the industrial Court committed an error of law and/or facts by failing to determine the applicant's dismissal was with or without just cause and excuse; and

(d) the Chairlady of the Industrial Court committed an error of law and/or facts and/or acted in excess of its jurisdiction in failing to take into account the matters, issues, evidence and factors that are relevant to the case before her.

FINDINGS AND DECISION OF THIS COURT

[5] It is trite law that an application for a judicial review may be granted if the impugned decision is tainted with illegality, irrationality, procedure impropriety and to a certain extend disproportionality. The court also may review not only the decision making process but also its substance.

[6] In the Federal Court case of *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal* [2018] 2 MLJ 537, the liberal approach on judicial review in *R Rama Chandran v The Industrial Court Of Malaysia & Anor* [1997] 1 MLJ 145 has been emphasised at p 571 as follows:

> [45] In the same appeal, Edgar Joseph Jr FCJ (Eusoff Chin in agreement) said that an award could be reviewed for substance as well as for process:
>
> *It is often said that judicial review is concerned not with the decision but the decision making process.* (See eg *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock *in Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
>
> *But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that such a decision is also open a challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.*
>
> In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit: (i) illegality, (ii) irrationality, and

(iii) procedural impropriety. This is how he put it:

> *By 'illegality'* as a ground for Judicial Review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> *By 'irrationality',* I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that the expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.
>
> Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development.

[7] Reverting to the present case, the crux of the matter here is the effective date of the applicant's dismissal and the decision by the Industrial Court to struck off the applicant's representation without hearing the merits of the case in the context of s 20(1) of the IRA 1967.

[8] On the issue of the applicant's date of dismissal, it is pertinent to make reference of the email dated 4 April 2013 which informed the termination of the applicant's employment. This notice of termination states that the applicant's last working day was end month May 2013.

[9] In this regard, firstly, there is no definition on date of dismissal in our legislation to rely on but it is a logical and reasonable conclusion that when no specific date given on effective date of dismissal, the date of dismissal by a notice has to be the date on which the notice expires.

[10] In *The Law of Termination of Employment* (5th Ed) by Robert Upex at p 144, it states the following:

> 2. THE DATE OF TERMINATION
>
> (a) The general rules
>
> (i) In actual dismissal cases
>
> 3.76 The date of termination, in cases in which the employee is actually dismissed by the employer or where the expiry of a fixed term contract is treated as a dismissal, is one of the following:
>
> 1. *if the dismissal is with notice, the date on which the notice expires; or*
> 2. if the dismissal is without notice, the date on which the notice takes effect; or
> 3. if the dismissal is constituted by the expiry of a fixed-term contract, the date on which the term expires.

[11] This issue on date of dismissal has also been decided by Industrial Court by following the principle laid down by the Court in England in the case of *Malaysian Airline System Berhad v Abdul Kader Mohamed Zulman, Kajang* [1984] 2 ILR 562 which states as follows:

> ... *From the decision in Brindle v Smith* [1973]1 All ER 230 *(CA) it is known that when dismissal is by way of notice the date of dismissal is the date on which it expires and this is unaffected by the circumstances that the employer waives his right to the employee's services during this time*. In *Lees v Arthur Greaves (Lees) Ltd.* [1974] 1 All ER 393, L was dismissed on 1st October 1971 with six months' notice. It was arranged that he should work out his notice (until 31st March 1972) but that his responsibilities would be more confined than hereto. On 28th Januari 1972 L was 'prevalied upon to finish, and did in fact finish on that date, accepting two months' full gross pay in lieu of working for the months of February and March 1972'. The Court of Appeal upheld L's appeal. Lord Denning found that the effect of the agreement was that L was still employed but not required to work for the remaining period of his notice.

[12] Likewise in the case of *Rheem (M) Bhd v Metal Industry Employees' Union* [1990] 1 ILR 550, where the Chairman of the Industrial Court said this:

> When were the services of the three claimants terminated? Was it on the date on which wages in lieu of notice were given, or was it on the date of expiry of the notice? The EA is silent on this point. *It appears clear to us that when a contract is terminated by the giving of notice (whether given by the employer or the employee) the effective date of termination is the date on which the notice expires*. But when a contract is terminated without notice, the effective date of termination is the date on which the termination takes effect ...

[13] In the Industrial Court case of *Abdul Rashid Jamaludin v Ultimate*

A *Manufacturing Solution (M) Sdn Bhd* [2015] 4 ILR 99, similar issue arose where the notice of termination states 'Your last working day will be 31st December 09'. The Industrial Court then decided that the effective date of the dismissal was on 31 December 2009. It also has not been shown that this decision has been overturned by the superior courts.

B

[14] As alluded to earlier, the notice of termination in the present case, used the phrase 'your last working day be the end month of May 2013' and this only mean the 31 May 2013. This date is the date the notice expires.

C

[15] In the circumstances, the date of the applicant's dismissal by the second respondent is on the 31 May 2013 as also mentioned in the minister's reference to the Industrial Court.

D **[16]** On the same issue, the Chairlady of the Industrial Court in the present case relied inter alia on a High Court case of *Southern Bank v Ng Keng Lian & Anor* [2001] 4 MLRH 569, to support her conclusion that the applicant's representation was premature.

E **[17]** However, I find, *Southern Bank*'s case is readily distinguishable on its facts. In that case, there was sufficient evidence to show that the employee was constructively dismissed on the 25 September 1998 and not on the 7 September 1998. Therefore, the claim was held prematurely made.

F

[18] Likewise in the Industrial Court's case, *Supermix Concrete (M) Bhd v Teoh Boon Beng* [1978] 1 ILR 274, where the evidence has established the fact that the representation was made while the claimant was still in the employment.

G

[19] Unlike the present case, the representation was made when the applicant is no longer in the employment of the second respondent as the date of the dismissal was on 31 May 2013. In fact the second respondent own witness, COW1, during cross-examination, agrees that the applicant was H effectively dismissed on 31 May 2013.

[20] Hence, the conclusion by the Industrial Court that the dismissal date of the applicant was on the 1 June 2013 and not 31 May 2013 is an error of law and fact.

I

[21] As that the applicant's date of dismissal was on the 31 May 2013, the issue of want of jurisdiction which is the basis for the Industrial Court to strike off the applicant's representation is no longer tenable. The applicant's representation is clearly not premature.

[22] In addition, the Minister's decision pursuant to sub-s 20(3) of the IRA 1967 to refer the applicant's representation to the Industrial Court was not challenged by the second respondent. As such, the Industrial Court must adjudicate the merits of the application including the jurisdictional issue. This is clearly explained by the Court of Appeal in the case of *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685; [1977] 3 CLJ 777 where it states:

> It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s 20(1) were made out of time, he must do so by seeking to quash, by certiorari, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. *Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question*, eg whether the particular claimant is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be taken or dealt with as preliminary objections. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act.

[23] As such, the decision of the Chairlady of the Industrial Court to struck off the applicant representation only on judisdictional issue without hearing the merits of the case is again and error of law, and irrational.

[24] Further, the Chairlady of the Industrial Court has failed to exercise her function under s 20 of the IRA 1967 when she decided to struck off the applicant's represention without determining the real issue as to whether the applicant's dismissal was with just cause and excuse. I find support of this view in the Federal Court case of *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537; [1995] 4 CLJ 449, where it states:

> As pointed out by this court recently in *Wong Yuen Hock v Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753 (folld), *the function of the Industrial Court in dismissal cases on a reference under s 20 is twofold, first, to determine whether the misconduct complained of by the employer has been established, and secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error which would merit interference by certiorari by the High Court.* Further, the Industrial Court would be acting in excess of jurisdiction if it changed the scope of the reference by substituting its own reason, that is to say, a reason not relied upon by the employer for the dismissal ...

[25] Furthermore, the Industrial Court in the present case has failed to appreciate the application of sub-s 30(5) which provides:

> (5) The court shall act according to equity, good conscience and the substantial

merits of the case without regard to technicalities and legal form.

[26] Pursuant to this sub-s 30(5), according to equity, good conscience and substantial merits of the case warrants the Industrial Court to hear the merits of this case to its conclusion and not merely decide based on technicalities as was done in the present case.

CONCLUSION

[27] Based on the aforesaid reasons, I find, the decision of the Industrial Court dated 13 July 2018 is tainted with error of law, irrationality and unreasonableness.

[28] In the circumstances, the applicant's judicial review application is allowed and the decision of the Industrial Court is set aside.

[29] The applicant's case is remitted back to the Industrial Court to be heard before another Chairman of the Industrial Court.

[30] The second respondent is also to pay costs of RM4,000 to the applicant.

Application allowed with costs of RM4,000.

Reported by Mohd Kamarul Anwar